

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

NOV 20 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Advanced Television Systems
and Their Impact Upon the
Existing Television Broadcast
Service

MM Docket No. 87-268

DOCKET FILE COPY ORIGINAL

To: The Commission

COMMENTS OF TURNER BROADCASTING SYSTEM, INC.

Turner Broadcasting System, Inc. ("Turner"), by its attorneys, hereby submits these comments in response to the Commission's Fourth Further Notice in the above-captioned proceeding.^{1/}

INTRODUCTION AND SUMMARY

The Commission is seeking comment regarding, inter alia, the impact of Advanced Television ("ATV") on the cable television mandatory carriage ("must-carry") requirements set forth in Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992^{2/} (the "1992 Cable Act") and the Commission's implementing regulations.^{3/} As noted in the Fourth Further Notice, the must-carry provisions are currently under constitutional

¹ In Re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice Of Proposed Rulemaking and Third Notice of Inquiry, FCC 95-315 (rel. Aug. 9, 1995) ("Fourth Further Notice"); see also Order Granting Extension of Time For Filing Comments And Reply Comments, DA 95-2137 (rel. Oct. 11, 1995).

² P.L. 102-385, 106 Stat. 1460, codified at 47 U.S.C. § 521 et seq.

³ 47 C.F.R. § 76.56.

No. of Copies rec'd
List ABCDE

029

challenge in Turner Broadcasting System, Inc. v. FCC.^{4/} In view of the possibility, indeed probability in our view, that the must-carry statute could be invalidated in that case, it would be premature and inappropriate for the Commission to promulgate new ATV must-carry regulations now prior to a final determination as to the constitutionality of the underlying statute. The Commission therefore should refrain from adopting new ATV must-carry regulations pending a final decision in Turner.

Furthermore, even assuming, for the sake of argument, that Sections 4 and 5 ultimately are upheld, the Supreme Court has already made clear that regulations mandating the carriage of television broadcast stations may be constitutionally promulgated only in certain, narrow circumstances where specific factual evidence is presented to demonstrate that the precise regulations at issue are necessary to protect substantial governmental interests.^{5/} Regardless of whether the must-carry provisions are sustained in Turner, the factual predicate necessary to establish a substantial governmental interest is not present here.

Under any circumstance, any record to justify any ATV must-carry regulations must encompass a full review and examination of the current state of the relationship between the cable and broadcast industries. There have been substantial changes since Congress considered the 1992 Cable Act, and the Commission must analyze the alleged need for ATV must-carry requirements against the current world.

⁴ Turner Broadcasting System, Inc. v. FCC, Case No. 92-2247 (D.D.C.)(and Consolidated Cases, Civil Action Nos. 92-2292, 92-9494, 92-2495, 92-2558).

⁵ See Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445, 2470-2472 (1994).

The must-carry requirements were adopted by Congress for the ostensible purpose of preserving the current system of NTSC television, not the system of digital broadcasting. The implementation of FCC regulations extending must-carry rights to digital television stations would significantly burden the fully-protected speech rights of cable programmers and operators without any substantial justification. Thus, to the extent the Commission deems it appropriate to develop new must-carry regulations now, prior to a final resolution of Turner, the Commission should limit its efforts to assessing what technical standards would be necessary to ensure that cable operators remain capable of carrying current NTSC television stations that either cannot or will not make the transition to the new ATV mode of service.

I. The Commission Should Refrain From Promulgating New Must- Carry Regulations Pending A Final Decision In Turner

The Supreme Court's decision in Turner raises significant questions about whether Sections 4 and 5 of the 1992 Cable Act are constitutional. Only one Justice of a deeply divided Court would have affirmed the District Court's majority finding that the must-carry provisions are constitutional.^{6/} Four Justices were prepared to invalidate the statute as patently unconstitutional,^{7/} while the remaining four Justices faulted the paucity of evidence in support of the must-carry provisions and remanded the case for specific factual proof from the Government that the "economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry," and that the must-carry provisions are sufficiently

⁶ Id. at 2473-75.

⁷ Id. at 2475-81.

narrowly tailored to avoid burdening substantially more speech than is necessary to effectuate the Government's legitimate interests.^{8/}

The must-carry provisions were thus returned to the District Court shorn of the natural presumption of constitutionality that ordinarily attaches to an Act of Congress. As the Court's plurality opinion makes clear (and is further underscored by the dissenting opinions), the Government bears the burden of proving and justifying both the need for, and the breadth of, the must-carry provisions. "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."^{9/}

Pursuant to the Court's instructions, additional factual information has been developed by the parties on remand. The parties have completed extensive discovery, and motions for summary judgment have been filed with the District Court and are currently pending. The disposition of those motions almost certainly will be appealed to the Supreme Court for review. If the must-carry provisions ultimately are invalidated, then the Commission would have no legitimate basis for promulgating new must-carry regulations extending carriage rights to digital broadcast stations. Hence, Turner respectfully submits that the Commission should defer its consideration of the must-carry provisions as they relate to ATV stations pending a final determination as to the validity of the underlying must-carry statute.

⁸ Id. at 2470.

⁹ Id., quoting Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985).

II. FCC Regulations Mandating the Cable Carriage of Digital Television Stations Would Not Likely Withstand Heightened First Amendment Scrutiny

Even assuming, arguendo, that the Government ultimately is able to sustain its burden of presenting specific factual information sufficient to justify the must-carry provisions at issue in Turner, the implementation of FCC regulations extending mandatory carriage rights to digital television stations, which will operate under circumstances dramatically different from traditional NTSC television stations, would not likely withstand heightened First Amendment scrutiny.

As discussed above, the Court in Turner recognized that the must-carry provisions burden the fully-protected speech rights of cable programmers and operators.^{10/} The Court also unambiguously found that the Government had failed to meet its burden of proving and justifying both the need for, and the breath of, the must-carry provisions as they relate to traditional NTSC television stations. The Court's decision makes clear that if the Commission were to adopt regulations according must-carry rights to digital broadcast stations, it would be required to demonstrate, based on specific factual evidence, that those regulations further a significant governmental interest that is unrelated to the suppression of free speech, and that the regulations do not burden substantially more speech than is necessary to effectuate the Commission's legitimate interests.^{11/} Turner believes that the Commission would have substantial difficulty satisfying these essential constitutional prerequisites.

Sections 4 and 5 of the 1992 Cable Act were promulgated to protect the economic viability of the NTSC television system in response to what Congress ostensibly perceived to be

¹⁰ Turner, 114 S.Ct. at 2456.

¹¹ Id. at 2469.

a competitive imbalance in the market power between cable operators and analog broadcast stations. In this regard, Congress found that, due to a variety of factors attributable in large part to the physical characteristics of analog television and cable transmission, cable operators enjoy a market position which gives them both the power and the incentive to harm their broadcast competitors.^{12/} Thus, Congress determined that unless such stations were accorded mandatory carriage rights, the economic viability of the NTSC television system would be seriously jeopardized.^{13/}

Here, in contrast, neither the legislative history of the 1992 Cable Act nor the record presented in this ATV proceeding demonstrates that the Government has a substantial and legitimate interest in extending the protections afforded by must-carry to the system of digital television broadcasting, which from a technical, operational and economic standpoint will differ radically from the system of NTSC television broadcasting. In this regard, neither Congress nor the Commission have made any findings concerning the factual necessity for must-carry in the context of digital broadcasting.^{14/} Nor has Congress or the Commission given any

¹² Id. at 2454.

¹³ Id. at 2455; see 1992 Cable Act, § 2(a) (16); S. Rep. No. 92, 102 Cong., 1st Sess. 60 (1991); Turner, 114 S.Ct. at 2470 (recognizing that Congress' asserted interest in passing the must-carry statute was to protect non-cable households from loss of regular television broadcasting due to alleged competition from cable systems.)

¹⁴ Although the Commission suggests that Section 614(b)(4)(B) of the Act evinces Congress' intent that the must-carry regulations should apply to digital broadcast stations, the cited provision is ambiguous at best and does not necessarily support the asserted proposition. Rather, the provision suggests that Congress was concerned about preserving the ability of cable operators to carry analog television stations that are required by the Commission to modify their signals to accommodate the introduction of ATV service, but that do not themselves make the transition to an ATV mode of operation. Indeed, since the must-carry statute is fundamentally predicated on concepts germane to the field of analog television broadcasting, this latter
(continued...)

consideration to the significant speech foreclosing effect that digital must-carry regulations would have on cable programmers and operators, particularly in view of the fact that digital stations will have the capacity to transmit multiple streams of data, voice and image simultaneously. Similarly, no findings have been made or any rational given as to why ATV must-carry regulations would be necessary instead of other, more narrowly tailored alternatives.

At bottom, the substantive analysis regarding any ATV must-carry regulations must be based upon a record that encompasses all aspects of the current relationship between the cable and broadcast industries. Congress did not prejudge the issue in 1992, and much has changed both in the marketplace and the applicable regulatory regimes since that time.

In short, there is even less factual evidence to support the constitutionality of ATV must-carry regulations than was deemed insufficient by the Court in Turner to sustain the must-carry provisions that currently apply to NTSC television broadcasters. Therefore, Turner respectfully submits that the Commission should refrain from adopting new regulations extending must-carry rights to digital broadcast stations. In the alternative, to the extent the Commission considers it appropriate to contemplate the impact of ATV on the mandatory carriage rights of broadcast stations, the Commission's inquiry should be focused narrowly on assessing what technical standards would be necessary to ensure that cable operators remain capable of carrying analog television stations that either cannot or will not make the transition to the new mode of digital broadcasting service.

¹⁴(...continued)
interpretation seems to be the better reading of the cited provision. Reference to the legislative history of the statute provides no contrary support.

CONCLUSION

For the foregoing reasons, Turner respectfully submits that the Commission should resolve the above-captioned proceeding in a manner that respects the First Amendment rights of cable programmers and operators, consistent with the recommendations set forth in these Comments.

Respectfully submitted,

TURNER BROADCASTING SYSTEM, INC.



Bruce D. Sokler
Christopher A. Holt
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Its Attorneys

Dated: November 20, 1995

F1/45985.1

CERTIFICATE OF SERVICE

I, Cynthia L. Curtis hereby certify that on this 20th day of November, 1995, a copy of the foregoing document was delivered by hand to each of the parties listed below.

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Roy J. Stewart, Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, D.C. 20554

Commissioner Rachelle Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Saul Shapiro
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

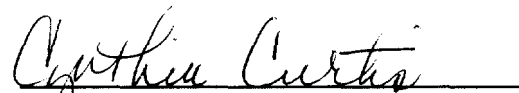
Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

David Fiske
Federal Communications Commission
1919 M Street, N.W., Room 202
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Audrey Spivak
Federal Communications Commission
1919 M Street, N.W., Room 202
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554


Cynthia Curtis